

NASA Langley Office of Chief Counsel Newsletter



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We find ourselves in early spring with renewed growth abounding. I am reminded of the birth of new ideas that so often takes place at NASA. It is not lost on me that LaRC's diverse mission involving innovating for the future, understanding the problems of flight, the earth's atmosphere, and exploring the boundaries of space often bump up against the boundaries set by our nation's laws. When we work closely with our clients beginning early in the process of accomplishing our mission, OCC is best at helping to prevent those boundaries becoming delays. It is often hard to avoid delays once the train has left the station. In that event, it is sometimes impossible to avoid stopping or delaying the train when we learn for the first time that the track on which the train is traveling has a missing piece. How much better the trip goes when, before the train leaves, the train conductor checks with the track engineer to learn that the piece of track is missing. Consider that the diversity of laws, regulations, rules, and policy applicable to a Federal agency like NASA are as complex as the laws of physics, the earth's atmosphere, or the unfriendly environment of space. With what I do know about the latter matters, I wouldn't want to venture into quantum physics, the troposphere, or the darkness of space without consulting my colleagues who are experts in the rules that apply to such ventures and can tell me that the track I'm on is just a hair off . . . before I embark on the venture. So, in this, the Spring 2011 edition of the OCC Newsletter, here is a little help from your attorney friends in LaRC OCC on some of the complexities involving renting cars, inventing, procuring items, interacting with colleagues, and entering agreements, just to name a few. Come see us before you venture off on the train. Enjoy,

Mike Madrid,
LaRC Chief Counsel

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PERSONNEL POINTS

When Rental Cars Go Crunch



Even though you may consider yourself a safe driver, eventually you may find yourself in the following situation: You are on official travel, driving a shiny rental car. Your meeting is over, and you are on your way home. Suddenly, weather conditions, other drivers, or a momentary distraction result in a fender bender. Or, when returning the vehicle to the rental company, you notice a large gash in the door of the car that wasn't there when you last looked.

Given the detail-oriented nature of most of our work, it seems surprising that NASA would let us drive a rental car without a six-week training course, annual recertification, and peer evaluation. The guidance is out there, but in admittedly obscure travel regulations. A recent issue of the Langley OCFO Travel newsletter provided some useful "Do's and Don'ts" for NASA travelers who are authorized to use rental cars for official travel (see the OCFO "LIFE" website, <https://life.larc.nasa.gov/>). The Safety Office frequently publishes articles on traffic safety. This article, however, takes a slightly different approach: how NASA employees and managers can avoid many of the problems that result when rental cars are damaged on official business.

A Special Contract:

A rental car contract is a binding legal agreement between you and the rental car company, even though you may be renting the vehicle pursuant to your NASA duties. If you have ever wondered why the lawyers refuse to let you sign contracts at Langley, but you get to sign hotel registrations and car rental forms when on

travel, it is because you, not NASA, are entering into the agreement in your personal capacity. Thankfully, the U.S. Government has negotiated a special deal for you with rental car companies. The "U.S. Government Rental Car and Truck Program" has some great features: low rates, guaranteed rates, last car availability, and inclusion of other U.S. Government employees conducting official business as additional drivers at no additional cost. The best feature, however, is that you and NASA essentially have full insurance coverage for anything except willful misconduct or gross negligence on your part.

Your official car rental should almost always be under this special contract.

It is your responsibility as a traveler to ensure that, whenever possible, you are covered under the Government program. If your rental agreement has a \$5.00 per day "GARS Fee" included, you are covered; if not, you probably are not. If your reservations are through NASA's travel vendor, the rental will be under the Government program. Under NASA regulations, if you do not use the services of NASA's travel vendor, you are personally responsible for any additional costs incurred by that decision. If you have an accident, and are not covered by the Government program, you could face a huge bill.

Because the Government program provides a high-level of coverage, except where specifically authorized by NASA or required by local law, you should not agree to additional insurance. Also, you do not need to pay fees for additional drivers, as all properly-licensed U.S. Government employees age 21 (18 in some cases) or older on official business are authorized drivers.

The U.S. Government program is available in foreign countries. Understandably, many counter personnel at foreign rental counters do not understand the program. If difficulties arise, use your best efforts to ensure your rental is under the same terms as originally reserved by the travel office.

That Ooops Moment:

Despite your best efforts, accidents do happen. If there are injuries or significant property damage (the level varies from state to state), you must report the accident to the local police. If the police investigate, obtain a copy of the report or information on how a report can be obtained. If the rental car is damaged, notify the rental company, and follow their guidance, unless their directions conflict with the information provided in this article. Insurance and other information from the rental company will be in the glove box or on the visor of the rental car.

Under the Government program, unless one of several exceptions (discussed below) apply, you are not responsible for damage to the rental car. This coverage includes dents, vandalism, fender benders, and serious accidents. Without going into the details, one employee on Center now knows it even applies to damage resulting from food poisoning.

If damage to the rental vehicle is noticed, you should cooperate with the rental company, and complete their forms. You may acknowledge that a report accurately reflects the damage to the vehicle. You must not, however, pay or agree to pay for damage. You should request specific guidance from the company on what to do with the damaged car, and how to obtain a replacement car, and follow that guidance.

Many rental counter personnel and those dealing with damaged vehicles are unaware of the coverage of the Government program. Incredulous looks, outright denials, and muttering are occasional responses. Politely asking for a supervisor, or referring them to the program website, however, may save you some paperwork hassles at a later date. Keep copies of all paperwork.

The Exceptions

There are some circumstances where the Government

Program does not provide any coverage. These exceptions are mostly obvious: If you are driving while intoxicated, using the vehicle for illegal purposes, or intentionally damage the vehicle, you are not covered. Other exclusions cover contact that isn't clearly improper: using a vehicle off road, across international borders, for towing, or to carry passengers for hire also relieves the rental car company from its obligations. The most interesting exclusion is for "operation of the vehicle in live artillery fire exercises, or used in training for tactical maneuvers."

Activities such as those listed above are generally not within the scope of a NASA employee's duties, so you should not expect NASA to cover damage resulting from these actions either. Your private insurance policy may not cover you in these situations, either, so exercise restraint and common sense.

The Government Program does not specifically exclude personal use of a rental vehicle, but the program is not intended for extended personal use. Additionally, when using a rental vehicle for personal use, you are still responsible for damage you may cause to other cars and property.

Home Again, Home Again

You should notify your supervisor of any accidents while on official travel, and notify the Chief Counsel's Office if you believe matters with the rental car company are not fully resolved.

If you are billed for damage or additional fees, or you receive notice of an intent to hold you or NASA responsible for additional charges, immediately bring all relevant documents to the Langley Office of Chief Counsel. Our office has an excellent track record of sorting out the most complex situations, but delay in responding can affect both your rights and those of NASA.

For more information:

U.S. Rental Car and Truck Program: <http://www.defensetravel.dod.mil/site/rental.cfm>

Federal Travel Regulations: <http://www.gsa.gov/portal/category/21222>

NASA Travel regulations: <http://nodis3.gsfc.nasa.gov/> and click on NPR 9700.1

Langley OCFO Site: <https://life.larc.nasa.gov/>

Langley Office of Chief Counsel: 757-864-3221; contact Ken at kenneth.goetzke@nasa.gov or 757-864-7390.

More Personnel Points

WHAT IS HARASSMENT?

One of the most frequent complaints in the government is that of “harassment.” Harassment takes many forms, and when based on a person’s gender, race, religion, age, disability, national origin or color (protected categories), it may be illegal discrimination. Note that sexual orientation and gender identity are also protected categories under NASA policy. The reason harassment “may be” illegal is because not all actions that are perceived by the victim as harassment rise to the level of illegal harassment. For example, a single isolated incident of a rude remark, unless it is extremely offensive, usually is not discrimination. Further, “workplace bullying” that is not based on a person’s protected categories is not illegal. However, this does not mean that just because behavior is not illegal it is acceptable.

The purpose of this article is to remind employees and managers that unprofessional behavior can come back to haunt you through various avenues of complaint (remember, it is never okay to discourage an employee from making a complaint or taking any action as reprisal because of it!), and to raise awareness that many employees do complain even if they do not challenge the behavior to the offender at the time it occurs. Usually, some level of investigation is required to determine what action management needs to take, whether it’s under LaRC’s Anti-Harassment Policy, EEO regulations and policy, or to address behavior that is “merely” inappropriate. Further, behavior that is perceived as threatening or involves physical contact is handled under a separate workplace-violence assessment process through the Security office and may result in a temporary or permanent bar of access to the Center while the complaint is investigated.

Examples of behavior that caused employees (“complainants”) to file harassment complaints with their agencies using the EEO process:

-- complainant was called a “redneck b---” on one occasion, and during one month coworkers held their fingers to their noses and complained that complainant ‘stinks.’ *Marjorie Northcutt v. Dept. of Treasury*, 0120073833 (Feb. 5, 2008) (dismissed without a hearing)

-- a coworker “yelled and cursed at complainant while holding a large tool.” *Clifford Caesar v. USPS*, 0120073799 (11/15/07) (dismissed without a hearing)

-- complainant “heard that” her supervisor had called her a name “behind her back.” *Brenda Fellman v. USPS*, 0120073611 (11/2/07) (dismissed without a hearing)

-- complainant’s trainer told him that she thought another male trainee was handsome. *Eugene Robinson v. Dept. of Homeland Security, OFO 0120061253* (Dec. 5, 2007) (went to hearing but claim not sustained; did not meet the definition of sexual harassment)

What do we see from the above examples? These are all what could be characterized as unprofessional behavior, and they gave employees fodder for filing a complaint. Even though these complaints did not succeed, the process of being under investigation is stressful for many who are accused of harassment, as well as being time-consuming. There is an appropriate manner to deliver a message, and it usually doesn’t involve anger, yelling or calling someone names.

One of the recent examples of behavior that have led to complaints here at Langley include the fact that employees have taken official photographs of President Obama off the walls and hidden them away. There are several reasons this is not acceptable. First, these are official government property and removing them is misuse of that property. Second, if employees are trying to justify this as political commentary, the Supreme Court has held that the First Amendment does not require an agency to tolerate behavior in the guise of “free speech” that disrupts a government workplace and intimidates other employees. *Connick v. Myers*, 461 U.S. 138, 154 (1983). And third, employees have perceived this behavior as a comment on the President personally, and his race (whether this was intended or not.) Unprofessional, juvenile behavior does not have to be verbal to be offensive. This is not the work environment we want to have at NASA, as reflected in the Agency and Center-level policies.

Common complaints that occur every few months are

those involving yelling, name-calling, insults, etc. in the guise of work criticism. Anyone can have a bad day, but we should all think before we speak and how we deliver the message, especially when anger or frustration is involved. Managers who have issues in their organizations with displays of inappropriate or unprofessional behavior should address it and not accept it as “that’s just the way this employee is,” or “it’s always been accepted.” If the offenders are themselves managers, higher-level managers need to address it. Managers must be held to the same standard. Often minimal corrective action, even just a discussion, is enough to address the problem before it gets worse. See your employee relations specialist in OHCM for guidance on this (Contact information is provided at the end of this article.)

NASA is fortunate to have a variety of resources available to employees to address issues that they may be facing. (Note that some of these are only available to NASA civil servants.) The Employee Assistance Program (EAP) is available for support covering a variety of stressors that employees may be facing, whether emotional, financial, or substance abuse. Many contractor employers have their own versions of EAP. Most NASA employees have health insurance plans that cover emotional health. NASA has an Ombuds program offering peer support and guidance. The Office of Equal Opportunity Programs has

an ADR (Alternative Dispute Resolution or mediation) program available to resolve disputes and workplace conflicts. Often just bringing people together and having a productive discussion is able to provide resolution to lingering resentments. The Agency also has an Anti-Harassment Program that is designed to rapidly address conflicts before they can escalate. Janet Sellars is the Center Anti-Harassment Coordinator.

If an employee has been the recipient of what they believe to be harassment, they are entitled to make a complaint. They can informally report complaints to their manager or chain of command, as with any work-related matter. Complaints on the basis of the above-mentioned protected categories may be discussed with the Office of Equal Opportunity Programs (Andrea Bynum.) Note that this article addresses only complaints about unprofessional behavior that does not include concrete “personnel actions” such as hiring and disciplinary matters (stay tuned for a future discussion on that, but general information on civil servant personnel actions and types of appeal may be obtained at any time through OHCM. Note that there are deadlines for these complaints, so do not wait if you have a particular action you want to challenge. For those of you in the bargaining unit, you should contact your union office for information.)

Office of Human Capital:

Rhonda Kendle (Employee Relations Specialist) 864-9386
Nicole Smith (Employee Relations Specialist) 864-8387

Office of Equal Opportunity Programs:

<http://oeop.larc.nasa.gov/index.cfm>
Andrea Bynum (EEO Counselor/ADR manager) 864-3289
<http://atlarc2.larc.nasa.gov/pdf/NASA%20Langley%20Non-Discrimination%20Policy%202008.pdf>
Janet Sellars (Center’s Anti-Harassment Coordinator) 864-3289
Anti-harassment policy: <http://atlarc2.larc.nasa.gov/pdf/Anti-Harassment%20%20Policy%20Statement09.PDF>

Center Ombuds:

Rolla Brown 864-3164
Nick Kepics 864-3159
Gilda Miner 864-1475
<http://atlarc2.larc.nasa.gov/ombuds.html>

Employee Assistance Program:

1-800-950-3434 or 757-826-8565 <http://ohcm.larc.nasa.gov/occuhealth/employeeassist.html>

Union Office:

864-4578 (John Warren, AFGE)



TO ENSURE EVERY CITIZEN . . . When we get into the weeds of accomplishing our day-to-day tasks together with our colleagues from industry and academia, our duties and roles can easily become blurred and, well, forgotten. It is important, however, for us to remember our responsibilities as civil servants. It is easy to forget that we are legally responsible for acquainting ourselves and complying with the ethics statutes and regulations that govern our conduct. The ethics statutes and regulations are varied and complex. They are based on the below fourteen principles of ethical conduct contained in Executive Order 12674 (as amended by E.O. 12731). These ethical principles serve as a good starting place to help us understand our unique responsibilities. It is good to remind ourselves that these principles are not in place to frustrate us but were established “to ensure every citizen can have complete confidence in the integrity of the Federal Government.” Have an ethics question?

- (1) Consider public service as a public trust, requiring you to place loyalty to the Constitution, the laws, and ethical principles above private gain;
- (2) Hold no financial interests that conflict with the conscientious performance of your duties;
- (3) Engage in no financial transactions using nonpublic Government information nor allow the improper use of such information to further any private interest;
- (4) Unless an exception applies, solicit or accept no gift or other item of monetary value from a person or entity seeking official action, doing business with, or conducting activities regulated by the Foundation, or whose interests may be substantially affected by the performance of your duties;
- (5) Put forth honest effort in performing your duties;
- (6) Make no unauthorized commitments or promises of any kind purporting to bind the Government;
- (7) Avoid using public office for private gain;
- (8) Act impartially and give no preferential treatment to any private party or individual;
- (9) Protect and conserve Federal property and use it only for authorized activities;
- (10) Engage in no outside employment or activities, including seeking or negotiating for employment, that conflict with your official Government duties and responsibilities;
- (11) Disclose waste, fraud, abuse, and corruption to appropriate authorities;
- (12) Satisfy in good faith your obligations as a citizen, including all just financial obligations, especially those -- such as Federal, state, or local taxes – that are imposed by law;
- (13) Adhere to all laws and regulations that provide equal opportunity for all Americans regardless of race, color, religion, sex, national origin, or handicap; and
- (14) Endeavor to avoid any actions creating the appearance that you are violating.

Intellectually Speaking

Inventorship: Not So Patently Clear-cut

U.S. Patent Law provides that whoever “invents” patentable subject matter is entitled to a patent. Although determining the “true” inventors may appear to be straightforward at first glance, it can actually be much more complex than it seems.



NASA encourages its inventors to disclose their inventions as soon as possible after “conception” via the e-NTR system. The “conception” of an invention occurs when the inventor has formulated the complete invention in sufficient detail as to enable a person of ordinary skill in the

art to make and use the invention without resort to undue further inventiveness or experimentation. A broad idea is not the conception of an invention where the one having the idea lacks sufficient information or understanding to adequately describe or to construct the device. “Conception,” however, does not also mean “construction.” The inventor does not have to build and test the invention in order to “reduce it to practice,” but the inventor must be able to adequately describe the invention so that the filing of the patent application results in a “constructive” reduction to practice.

Correct inventorship is important. A person is not entitled to a patent if that person did not invent the subject matter to be patented. A U.S. patent must be applied for in the name of the actual inventor(s) and an application by untrue inventor(s) is unauthorized by law and is invalid until inventorship is properly corrected. A person to whom the true inventor(s) communicates the idea of the invention is not considered an inventor, but the fact that such person(s) inquired or received advice from others in the course of research does not preclude a claim to inventorship. Also, a person who suggests to another that a certain thing be done but who does not suggest the materials, method, and/or apparatus embodied in the patent application is not an inventor.

Typically, for the suggestion to constitute part of an invention, the suggestion must have furnished enough information to enable an ordinary mechanic to put the invention into operation without the exercise of any ingenuity or special skill.

When an invention is made by two or more persons jointly, all inventors must be listed on the patent application. Barring specific extenuating circumstances (e.g. an inventor’s death or refusal to participate), none of the joint inventors alone, nor less than the entire number, can apply for a patent on an invention by them jointly. Inventors may apply for a patent jointly even though (1) they did not physically work together or at the same time, (2) each did not make the same type or amount of contribution, or (3) each did not make a contribution to the subject matter of every claim of the patent. A co-inventor whose suggestion transforms a marginally operable invention into a successful one is properly named a joint inventor. However, typically a person is not a co-inventor if he or she merely offers a suggestion to the inventor or merely assists the inventor.

After a patent application is filed at the Patent Office, the patent examiners do not typically engage in an inventorship determination; rather, it is the responsibility of the inventors and patent counsel to ensure that the named inventors are the “true” inventors. Inventorship is determined based on what is claimed in the patent. The claims of a patent are the numbered paragraphs appearing at the end of the specification. Keep in mind that it is possible for different claims to have different inventors. In fact, inventorship can change throughout prosecution of the patent application as the claims are amended, added, or cancelled. For example, a patent application can contain claims directed to a product and a method of using the product, where Inventor A conceived of the product and Inventor B conceived of the method of using the product. In that case, if the claims directed to the method of using the product are cancelled, then Inventor B should be removed. However, Inventor B could be named on a subsequent patent that is directed only to that method of using the product.

So how can we make sure that the “true” inventors are correctly named on NASA’s patents? In the OCC’s most

recent quarterly newsletter, we mentioned the importance of proper documentation, such as by keeping witnessed lab notebooks. Keeping a proper record provides us with written proof of the inventor's identity and the date of conception. This documentation is very helpful to us and to the inventors at various stages of the patent prosecution process (e.g. filing the patent application, during claim amendments, etc.).

You can also help us by specifically identifying each innovator's contributions on the invention disclosure form. Section 17(f) of the invention disclosure form requires the submitter to describe the "contribution of the innovators." This section should specifically describe each innovator's contribution to the invention. Conclusory descriptions that the invention is "50%

innovator A and 50% innovator B" do not help us determine which persons should be named as the "true" inventors, and may require us to contact you for further information. In using the above example with the product and method claims, a more acceptable answer would be "Innovator A conceived of the product, Innovator B conceived of the method of using the product." If more than one innovator conceived of the invention, each innovator's specific technical contributions to the invention should be provided.

After considering all of the above, we realize that inventorship determinations likely involve disagreement and create annoyance for the innovators. However, helping us resolve these issues early on may avoid later conflicts and will hopefully produce patents that are that much stronger for NASA.

Your IP Questions Answered

Question:

Is there guidance available for who should be listed as an author on publications?

Answer:

Yes. Although the OCC does not typically get involved in questions of authorship (unlike inventorship determinations), NPR 2200.2B "Requirements for Documentation, Approval, and Dissemination of NASA Scientific and Technical Information" provides guidance on who should be named as an author on NASA publications. NPR 2200.2B states that authorship of NASA publications is generally reserved for persons who participate in the performance of the work and who can effectively defend the main technical content of the publication to a peer group. Because of the complexity of scientific and technical work, many publications have multiple authors. The NPR further states that the authors' names should appear in a sequence that indicates their respective responsibility for the reported results; that is, the first author is the chief contributor and writer, and other authors follow in the order of their responsibility for the work. The NPR further provides that it is appropriate to acknowledge significant contributions directly related to the substantive content or preparation of a NASA STI Report Series by individuals other than the authors. When an acknowledgment of



contribution is warranted, it is included in a paragraph on the back of the title page.

For any authors intending to publish their technical papers, the authors are required to go through a review and approval process at NASA. The approval process includes approval by a branch head, an Organizational Unit Manager (OUM), the Center Export Administrator, Patent Counsel/Attorney (Robin Edwards, Tom McBride, or Andrea Warmbier) where the author(s) indicate new technology or third party content, and the Publications Manager. During this process, there may be a review of authorship as well as content during those stages of review.

If the technical paper is going to be published outside of NASA, authors should keep in mind that many journals and professional societies provide guidelines for authorship. For example, the AIAA website provides: "To protect the integrity of authorship, only persons who have significantly contributed to the research and paper presentation should be listed as authors."

Congratulations to Inventors of Recently Issued U.S. Patents

<i>Title</i>	<i>Issue Date</i>	<i>Issued Patent Number</i>	<i>Inventors</i>
Method and Apparatus for Shape and End Position Determination Using an Optical Fiber	10/12/2010	7,813,599	Jason P. Moore (NASA LaRC)
Wireless Sensing System For Non-Invasive Monitoring Of Attributes Of Contents In A Container	10/19/2010	7,814,786	Stanley E. Woodard (NASA LaRC)
Multiple-Wavelength Tunable Laser	12/7/2010	7,848,381	Norman P. Barnes (NASA LaRC) Brian M. Walsh (NASA LaRC) Donald J. Reichle (NASA LARC)
Resonant Difference-Frequency Atomic Force Ultrasonic Microscope	12/7/2010	7,845,215	John H. Cantrell (NASA LaRC) Sean A. Cantrell (LARSs Student)
Metal/Fiber Laminate and Fabrication Using A Porous Metal/Fiber Preform	12/14/2010	7,851,062	Stephen J. Hales (NASA LaRC) Joel A. Alexa (Lockheed) Brian J. Jensen (NASA LaRC) Roberto J. Cano (NASA LaRC) Erik S. Weiser (NASA LaRC)
Air-Coupled Acoustic Thermography for In-Situ Evaluation	12/21/2010	7,855,368	Joseph N. Zalameda (US Army Research Laboratory) William P. Winfree (NASA LaRC) William T. Yost (NASA LaRC)
Support Assembly For Composite Laminate Materials During Roll Press Processing	1/18/2011	7,871,682	Luke A. Catella (NASA LaRC)
Robotic-Movement Payload Lifter and Manipulator	2/1/2011	7,878,348	William R. Doggett (NASA LaRC) Bruce D. King (Lockheed) Timothy J. Collins (NASA LaRC) John T. Dorsey (NASA LaRC)
Aircraft Wing For Over-the-Wing Mounting Of Engine Nacelle	2/8/2011	7,883,052	Andrew S. Hahn (NASA LaRC) David J. Kinney (NASA Ames)

Method Of Simulating Flow-Through Area Of A Pressure Regulator	2/15/2011	7,890,311	Neal E. Hass (NASA LaRC) Paul A. Schallhorn (NASA Kennedy)
Dual-Use Transducer for Use with a Boundary-Stiffened Panel and Method of Using the Same	2/22/2011	7,893,602	Noah H. Schiller (NASA LaRC) Randolph H. Cabell (NASA LaRC)
Method for Predicting and Optimizing System Parameters for Electrospinning System	3/8/2011	7,901,611	Russell A. Wincheski (NASA LaRC)
Wireless System And Method For Collecting Motion and Non-Motion Related Data of a Rotating System	3/8/2011	7,902,815	Stanley E. Woodard (NASA LaRC) Bryant Douglas Taylor (Swales Aerospace)
Electrically Conductive, Optically Transparent Polymer/Carbon Nanotube Composites And Process For Preparation Thereof	3/15/2011	7,906,043	John W. Connell (NASA LaRC) Joseph G. Smith, Jr. (NASA LaRC) Joycelyn S. Harrison (NASA LaRC) Cheol Park (National Research Council) Kent A. Watson (National Research Council) Zoubeida Ounaies (Universities Space Research Assoc.)
Epitaxial Growth of Cubic Crystalline Semiconductor Alloys on Basal Plane of Trigonal or Hexagonal Crystal	3/15/2011	7,906,358	Yeonjoon Park (Science & Technology Corp) Sang H. Choi (NASA LaRC) Glen C. King (NASA LaRC)
Controlling Second Harmonic Efficiency of Laser Beam Interactions	3/22/2011	7,912,101	Norman P. Barnes (NASA LaRC) Brian M. Walsh (NASA LaRC) Donald J. Reichle (NASA LaRC)



Have an idea? Disclose it with NASA's Electronic New Technology Reporting website or "e-NTR." The website can be found on the @LaRC webpage under "Report a New Technology," or by going to <https://ntr.ndc.nasa.gov/>. Please also feel free to view an instructional video available online at

http://www.youtube.com/user/TechnologyGateway#play/all/uploads-all/0/t-Yc_l482i4. For initial login or other technical assistance, please contact the e-NTR Help Desk at 865-2233.

Business Law News

A BRIEF EXPLANATION OF SPACE ACT AGREEMENTS (SAAs)

You may have heard about SAAs, or even been involved with them in the course of your work. These instruments provide NASA with a uniquely flexible way to collaborate with research partners in the private sector or elsewhere in Government, or to provide services on a reimbursable basis. So just what is an SAA and what are the rules regarding its use?

The Space Act permits NASA to enter into and perform “contracts, leases, cooperative agreements or other transactions” necessary in the conduct of its work, on such terms and conditions it deems appropriate. An SAA implements that “other transactions” authority. NASA uses SAAs to perform reimbursable work for other Government entities, private industry and academia, as well as to perform collaborative work on a non-reimbursable basis. Although SAAs can provide funding to NASA’s partners, such “funded SAAs” are only to be used when no other form of agreement (Contract, Cooperative Agreement, Grant) will suffice. Funded SAAs also require NASA HQ approval and typically require special competitive processes. In addition, a form of the SAA, called an Interagency Agreement (IA), can be used to work collaboratively with other agencies or for them to reimburse NASA for work NASA performs on their behalf. When sending funds to other Agencies, NASA typically relies on the procurement process and the IA may be developed with the Office of Procurement (OP).

Our SAA authority is implemented by NPD 1050.1, which requires all SAAs (and IAs) to be used in furtherance of an authorized Agency purpose. Thus, NASA does not perform work for others when the work does not fit into the NASA mission, e.g., we do not do wind tunnel tests on footballs because NASA is not in that line of work. Rather, we do work for other entities that make use of unique NASA goods, services and facilities that are not being fully used to accomplish mission requirements. We are limited to doing this type

of work for others on a noninterference basis consistent with our mission. In addition, it is NASA policy that we not compete with private sector resources. If a service can be obtained from the private sector, NASA should not provide that service to outside entities. Further, the NPD requires certain minimum terms be included, e.g., that all work is done on a “reasonable efforts” basis, that the SAA contain clear milestones, have defined financial commitments, that other NASA priorities may preclude doing the work when called for, that liability and risk of loss be allocated between the parties, that intellectual property rights be spelled out clearly, that there be a way to terminate the SAA, that it contain a dispute resolution mechanism, and that there is a fixed end date for the SAA.

If you think you want to enter into an SAA or IA, whether it is to be on a reimbursable or non-reimbursable basis, you should contact SRO, which maintains the Space Act Agreement Maker (SAAM). SAAM is a program that asks questions about what you want to do, and then puts together a draft SAA. Think of it as TurboTax® for SAAs. The document probably won’t be exactly perfect, but it will capture the most important aspects of the agreement, and our office will assist you through our review to ensure it is correct. Certain SAAs and IAs require review by the HQ Office of Program and Institutional Integration (OPII), e.g., agreements where foreign entities are involved, media attention is likely, there is a direct impact on Mission directorate activities or assets, the work is novel, or other similar circumstances. SRO and OCC will assist in determining when OPII review is needed.



In addition, if costs are being waived (a partially reimbursable agreement, where NASA recovers only a portion of its costs, or non-reimbursable agreement), OCFO approval is required. If the waiver involves partial waivers of direct costs (not CM&O costs), then HQ review also is required. This is a relatively new requirement; however, the LaRC OCFO has had to approve cost waivers even before this new process was instituted. When a cost waiver is to be granted, you

must identify the Mission Directorate or project that has agreed to cover that cost, to include a WBS number, together with the reason why this waiver is appropriate. In most instances, waivers are granted where the work is collaborative in nature and NASA will obtain something in return, such as greater intellectual property rights, or maintenance of a critical capability so NASA missions may use it at a later time. You also need to ensure that if NASA funds are being used, that such use complies with all fiscal requirements, e.g., that the funds are appropriate for this purpose (an appropriation covers such activity), are available for obligation (i.e., are for the correct fiscal year) and in a sufficient amount to cover the effort. Again, your program analyst and OCFO can assist in this determination, and OCC is required to review these determinations, as documented in an Estimated Price Report (EPR).

As indicated above, when funds are being sent by NASA to another Government Agency, OP develops the

agreement using the procedures of the NASA FAR Supplement. In such cases, OP asks you to fill out a questionnaire to assist in putting together a Determinations and Findings (D&F) that is required by government-wide regulations to support such actions. The purpose of the D&F is to document that it is more economical or convenient to rely on another Agency than to procure the goods or services from commercial sources by contract.

As you can see, there are a number of things you must know and do to make an SAA come into being, and while this article is anything but comprehensive, you are not alone in making it happen. SRO, OCFO, OP, and OCC all play roles in supporting you in putting together an SAA. The sooner you involve these organizations, the greater your likelihood of getting your SAA in place quickly and with a minimum of problems. As always, OCC attorneys are ready to help you use this great tool to get your job done.

No Longer Title 42

The United States Code (USC) is the official compilation and codification of the general and permanent federal law of the United States of America. The USC was originally created in 1926 and consisted of 50 Titles. The 50 Titles are broad subject areas that reflect topics that the law addressed in 1926. As new laws are passed they are codified into the USC and placed under those 50 topics where an office in the House of Representatives best thinks they should be placed. As one might expect, over 80 years the topics covered by U.S. law have gone far beyond what Congress thought about in 1926.

A prime example of this has been NASA and U.S. laws relating to space. As laws establishing NASA and commercial space programs were enacted they were codified in title 15 (Commerce and Trade), title 42 (The Public Health and Welfare), and title 49 (Transportation). However, in December 2010, a law was signed that added the first new Title to the USC since 1926. Title 51 covers the “National and Commercial Space Programs” and has re-codified laws from the three titles previously mentioned. Title 51 became effective December 18, 2010 when signed into law.

This will require a change to citations regarding the National Aeronautics and Space Act (the revision has deleted “of 1958”) and many of the other space laws that ASA has typically conducted business under. One caution, do not think you can just replace “title 42” with

“title 51” as the re-codification has moved and renumbered all the sections and subsections that we as an agency routinely cite. While there were no substantive changes to the laws, all the provisions have different section numbers and some items that used to be in the same section have been split between different sections, in others items have been combined, and in some cases provisions are unmodified except as to the citation.

There are tables that list the old and new sections; however, OCC has found them difficult to use and, on occasion, to be in error. We will assist you in making the conversions if you wish and typically most citations to the Space Act are limited to things like the citation to the Space Act or the authority to promulgate regulations.

Some new citation examples of commonly cited provisions:

- The National Aeronautics and Space Act, as amended, 51 U.S.C. § 20101, *et seq.*
- Authority for NASA to promulgate rules and regulations: 51 U.S.C. § 20113(a).
- Authority to enter into contracts, leases, cooperative agreements, or other transactions (Space Act Agreements): 51 U.S.C. § 20113(e).
- Authority to protect information developed under certain agreements for up to five years: 51 U.S.C. § 20131(b)(1).

PURCHASING ITEMS TO GIVE AWAY – THE RULES ARE NOT SIMPLE

Why can I give NASA themed labeled pens, rulers, bags, and the like) NASA outreach not to and my own organization or at an internal meeting or conference?



away various articles (NASA lapel pins, mouse pads to children at educational activities but employees contractors in

The short answer is that NASA employees and NASA contractors are not proper recipients of outreach items since employees and contractors already work for and with NASA and are typically aware of on-going NASA programs and projects. Yet many of us presume that if an item is given to members of the public as part of a NASA outreach or promotional campaign, we can also use a government purchase card to acquire similar items to hand out within or related to our own LaRC organization. This can be an incorrect and financially perilous presumption because there are a number of fiscal law rules that must be met before such items may be bought and given away.

The first level of analysis one must apply to determine if it is okay to acquire items to hand out within or related to our own LaRC organization is the “purpose” test. A basic tenet of fiscal law is that appropriated funds (money Congress approves for NASA to carry out its mission) may be used only for the *purposes for which they are appropriated*. To apply the purpose test, we must look to the Act (the law Congress passes) under which the funds were appropriated to see if Congress specifically identified the Agency’s purchase of that item as a purpose for which the funds could be used.

Congress does not, however, typically get down to that level when it appropriates funds to federal agencies. For example, with respect to outreach, through the Space Act Congress has provided NASA statutory authority (legislation Congress passes) to disseminate information regarding the results of its activities and, through subsequent legislation, provided for NASA to maintain programs to increase student interest and participation in science, technology, engineering and math (STEM). Consequently, under this authority NASA can hold an outreach event to increase student interest in STEM. However, this legislation does not include authority to make particular purchases, and NASA’s annual appropriations do not generally identify

particular educational outreach items as purposes for which NASA’s funds may be used. If an item is not specifically identified as a permissible purchase to carry out a mission, program, or project, we must move to the second level of analysis in a fiscal law question: the *Reasonable and Necessary Expense Test*.

Under the Reasonable and Necessary Expense Test, an Agency may generally use its appropriated funds for purposes and items not specifically identified in an appropriation act if the expenses in question are reasonable and necessary to accomplish a particular authorized agency mission (and not otherwise prohibited or separately funded). Under this test, certain outreach items can be considered reasonable and necessary to accomplish NASA’s mission of increasing student interest in STEM so long as the items are not otherwise prohibited.

This brings up the third level of analysis in fiscal law: reviewing Government Accountability Office (GAO) opinions on the permissible use of appropriated funds. The GAO is responsible for issuing opinions to federal agencies concerning the proper use of appropriated funds to purchase items that are reasonable and necessary to accomplish an agency mission. The GAO has issued many decisions identifying various types of items for which appropriated funds may not be used because such items may be categorized as *personal expenses or otherwise inappropriate for use of appropriated funds*. Clothing (e.g., T-shirts and hats) typically falls in this category. The GAO has also opined that ashtrays, holiday decorations, food (generally), and many other items fall into the “otherwise prohibited” category. Using this analysis, the reason for which an agency employee wants to purchase an item becomes very important; an item that may be purchased for STEM awareness may be inappropriate for purchase to hand out in another context such as at an internal NASA meeting or conference attended by only NASA civil servants and contractors. Because the authority to purchase a particular item to accomplish a NASA purpose is often tied to the unique facts and a specific mission, an employee should not rely on legal and procurement concurrence to purchase an item in one situation as concurrence to purchase it in another situation.

Because there are many items employees generally cannot purchase with appropriated funds, LMS-CP-4540, Purchase Card contains a list of items NASA employees may not purchase with the NASA purchase card. But this list can cause confusion since we might see circumstances where some of these items met the

test for use of appropriated funds in relation to particular NASA missions. For many purchases, and when in doubt, employees must coordinate with the Office of Procurement (OP) and the Office of Chief Counsel (OCC) on planned purchases of items that will be handed out to the public or to NASA employees or

contractors. This front end coordination with OCC and OP can save an employee personal, out of pocket expenses, if it turns out that appropriated funds may not be used for the items for which the employee authorizes the purchase with appropriated funds.

Humor and Other Stuff

PAYING LAST RESPECTS: A lawyer, scientist, and engineer had a mutual friend who passed away. Each owed the friend \$1000.00 at the time the friend passed away. The three agreed that at the funeral of the friend, they would each place the \$1000.00 they owed in their friend's casket. When the scientist and engineer visited at their friend's casket for a final viewing, each tucked \$1000.00 in the casket. A few minutes later, the lawyer approached the friend's casket. He took the \$2000.00 cash and replaced it with a \$3000.00 check.

JUST THE RIGHT SIZE: To the optimist, the glass is half-full. To the pessimist, the glass is half-empty. To the engineer, the glass is twice as big as it needs to be.

FEATURE STORY: Most people believe that if it ain't broke, don't fix it. Engineers believe that if it ain't broke, it doesn't have enough features yet.

THE SCIENCE PERSPECTIVE:

A neutron walks into a bar; he asks the bartender, "How much for a beer?" The bartender looks at him, and says "For you, no charge."

Two atoms bump into each other. One says "I think I lost an electron!" The other asks, "Are you sure?" to which the first replies, "I'm positive."

The American Bar Association's Top 25 Legal Movies:

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|---------------------------------------|----------------------------------|--------------------------------------|
| 1. To Kill a Mockingbird (1962) | 9. Erin Brockovich (2000) | 18. Reversal of Fortune (1990) |
| 2. 12 Angry Men (1957) | 10. The Verdict (1982) | 19. Compulsion (1959) |
| 3. My Cousin Vinny (1992) | 11. Presumed Innocent (1990) | 20. And Justice For All (1979) |
| 4. Anatomy of a Murder (1959) | 12. Judgment at Nuremberg (1961) | 21. In the Name of the Father (1993) |
| 5. Inherit the Wind (1960) | 13. A Man for All Seasons (1966) | 22. A Civil Action (1998) |
| 6. Witness for the Prosecution (1957) | 14. A Few Good Men (1992) | 23. Young Mr. Lincoln (1939) |
| 7. Breaker Morant (1980) | 15. Chicago (2002) | 24. Amistad (1997) |
| 8. Philadelphia (1993) | 16. Kramer vs. Kramer (1979) | 25. Miracle On 34th Street (1947) |
| | 17. The Paper Chase (1973) | |

Source: ABA Journal, August 2008